

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-8076
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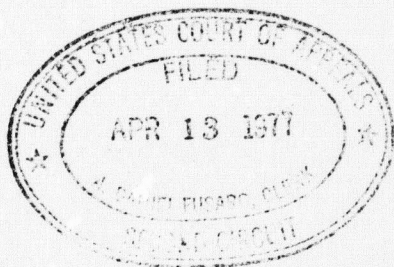
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Appellee, : 77-8076
-against- :
JOSEPH SAMPSON, :
Defendant-Appellant. :
-----x

BRIEF FOR THE APPELLANT JOSEPH SAMPSON

On Appeal From a Judgment From the United States
District Court For The Southern District of New York



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STATEMENT OF THE CASE

Pre-Indictment

After two years on the run, Jack Brown surrendered to Federal authorities on April 4th, 1975. (T990, T2532)* This brought to an ostensible close a life of crime which had continued uninterrupted from the time of his release from the penitentiary in 1964 (T989) until he surrendered to the FBI in irrational fear of his life.** Once in custody, he began to give information about a far-flung drug empire with spokes in Washington, New York, Miami, and Chicago, at the hub of which he stood.

From Indictment To Trial

Ultimately, an indictment was returned, based largely on his testimony and other evidence gleaned from his information. After the arrest and arraignment of the named defendants in the indictment, a motion for severance was made in which counsel suggested to the Court that due to the massive nature of the indictment, the number of defendants to be tried at one time, and the enormous potential for prejudice (T45), that

*References throughout this brief are: T=transcript; H=Suppression Hearing; A=Joint Appendix; SA=Supplemental Appendix of Joseph Sampson.

**In January of 1971, Jack Brown wrote a letter addressed to the FBI (T2230) which they later obtained. (G3505W for ID) In it he told a phantasmagorical story of laser lights that could see through steel (T2232) and other implements with which diverse people wished to do him bodily harm. (T2233)

smaller functional groups could be culled from the indictment for trial.* (T50) Nonetheless, trial commenced on August 10th, 1976, with 21 defendants, 22 defense attorneys and three prosecutors in the well, justifying the prediction made on June 4th that there would be a circus atmosphere. (T26-28).

The Evidence In Regard To Joseph Sampson

Joseph Sampson and Jack Brown met in late 1960 (T1164) but renewed the relationship after Brown's incarceration in 1967. Brown testified that Sampson wished to take over the business of Roland Brown who had been sent to jail (T1167). There is no corroboration of the conversation that Brown says took place on that subject. From time to time, according to Brown, Joseph Sampson received drugs from him in 1/8 kilo amounts of cocaine and heroin. (T1167) Although Brown testified that Sampson used his wife as a messenger (T1168), for which there is no corroboration, Brown testifies that he commenced to deal with Joe Sampson's wife, Lois, in 1968 (T1168) and continued to deal with her until 1973. (T1169) His relationship with Joseph Sampson terminated in 1972.

Chief corroboration as to Joseph Sampson came from the testimony of Michael Parker and personal papers seized from the home of Lois and Joseph Sampson during two separate searches in 1974 and 1976. (SA 6-19)

*Joseph Sampson hereby adopts all points raised by co-appellants which are applicable to him pursuant to Rule 28i of Federal Rules of Appellate Procedure.

Aside from corroborating that the Sampsons knew Brown, the only corroboration of Joseph Sampson's professional relationship with Brown was hearsay declarations from Brown. (T3406-3408). His only observance of Joseph Sampson with drugs was seeing Brown and Sampson use some cocaine, which he referred to as "personal blow." (T3409-3410)

In fact, Parker conflicts with Brown's testimony that Joseph Sampson was a heroin customer inasmuch as the declaration he attributes to Brown about Sampson concerns only cocaine. (T3407) There is no independent evidence on this trial outside of Brown's testimony in regard to Count 20 (the heroin count) of the redacted indictment.

Parker, in fact, fails to corroborate the professional nature of the Joseph Sampson-Jack Brown relationship. On debriefing at the time of his (Parker's) arrest, he failed to mention Sampson as a visitor to the Brown apartment for drug purposes in an exhaustive and hand-corrected list of such visitors. (T3827-3828). Other than the suspicious testimonials by Brown as to cocaine, Parker's testimony about Joseph Sampson is of a close friend of Brown's (T3409) who was the god-father of his (Parker's) children (T3410) and who was considered family enough to be invited to prize fights around the country which were considered family affairs. (T3283)

Lois Sampson, however, was the subject of extensive testimony by her sister, Ann Reynolds. Reynolds was approached by her sister, Lois Sampson, in March of 1973, who inquired whether Jimmy Lofton, Reynolds's friend, would be interested in buying cocaine (T4544). Jack supplied seven kilos (T4564). The balance of the ten-kilo deal (T4557) was consummated in April of 1973 (T4571) shortly after Brown went underground. (T4572) Ann Reynolds failed to testify to any knowledge of Joseph Sampson's activities although she apparently knew him well enough to identify his handwriting in one of the address books seized in 1974 (T4582), as well as that of her sister's in the same book. She was not cross-examined by counsel for Joseph Sampson. Aside from those two entries, no effort was made by the government to distinguish between entries made by the Sampsons in any of the address books seized. (See Exhibits numbered 44 in evidence)

As the government began to prepare for summation, the inherent conflict between Mr. and Mrs. Sampson commenced to show. One of the charts prepared by the Government (Exhibits 178, 179, and 180) dealt with telephone calls charged to the phone in the Sampson household. The government had entitled it "Calls From Telephone Used By Joseph and Lois Sampson." (T6127) Counsel for Joseph Sampson objected on the grounds that proof in the case showed that Lois Sampson was the listed owner

of the phone and that the chart should reflect it. The government conceded the point (T6130-31), at which time counsel for Lois Sampson moved for a mistrial. (T6127-6128)

After a short hiatus, counsel for Joseph Sampson, at the direction of his client, withdrew the request to amend the chart. (T6142-6143)

More serious was a conflict over the interpretation of Ann Reynold's testimony. Counsel for Joseph Sampson wished to point up the involvement of Lois Sampson after Joseph Sampson had disappeared from the testimonial scene (T7282). By admitting Ann Reynold's credibility, counsel would have argued that the failure of Lois to inculcate Joseph to her sister tended to show that Joseph had never truly been involved. (T7282-7287). Counsel for Lois Sampson threatened a mistrial motion the moment such argument was raised, but apparently at that time felt no urge to move for a severance.

The trial court suggested that the way out is to merely assert Reynold's trustfulness arguendo, but, in fact, neither counsel accepted this plainly insufficient compromise. (T7544-7547). Joseph Sampson directed his attorney not to make the argument. (T7546)

Both Sampson's were convicted on all counts submitted. Joseph Sampson was sentenced to 10 years on each count, to be served concurrently. Lois Sampson, as the more heavily involved participant in the conspiracy (T9609) was sentenced

to 12 years on each count, to be served concurrently. Each received a term of special parole.

POINT I

FAILURE OF THE COURT TO
GRANT A SEVERANCE PREJUDICED
JOSEPH SAMPSON.

Although it is not error per se to join a husband and wife as co-defendants in a conspiracy case, such joinder is fraught with problems. See, United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972); United States v. Thoreson, 281 F.Supp. 598 (N.D.Calif. 1967). In the case at Bar, there was an early recognition by counsel of this inherent problem when Joseph Sampson moved pre-trial for a severance based upon the conflict, albeit speculative at that time, which would be engendered by his wife's testimony in her own defense. This might be within the privilege that could be asserted by Joseph Sampson. See United States v. Thoreson, supra. That ground for conflict, as it turned out, never materialized during the course of the trial. What did materialize, however, which could not be anticipated given the rather lean discovery permitted by the trial court, was that the evidence as adduced by the government witnesses not only made Mrs. Sampson the more culpable of the pair, but in fact opened the door to legitimate arguments on Mr. Sampson's part that he was nothing more than a by-stander who at most had knowledge of his wife's activities and that the testimony of the government witnesses as to him was a lie..

To make that defense, however, Sampson would have had to adopt the testimony of the witness Ann Reynolds, Lois Sampson's sister. He would have to shore up her credibility in order to make the argument which was laid out in its bare bones during counsel's last severance motion prior to summation. Counsel was perfectly prepared to do this, but was directed by his client not to make that argument because there was substantial risk of assisting the government in convicting Lois Sampson.

Severance motions based on antagonistic defenses are no strangers to our courts or indeed to this Circuit. See, United States v. DiGiovanni, Slip Opinion Docket No. 76-1097, decided November 9, 1976, U.S.C.A. 2d Circuit. But it is rare that the party who could initiate the conflict by incriminating the other makes the motion to be severed. In fact, counsel is unable to find even one case where antagonistic defenses had arose in this procedural posture.

Joseph Sampson's argument, reduced to its simplest terms, is that the court, in requiring him to elect between defending himself at the expense of his co-defendant wife or waiving certain defenses which would normally be his right to do, denied him due process. The law has traditionally "refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake" in the "belief that such a policy was

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necessary to foster the family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well." Hawkins v. United States, 358 U.S. 74, 77 (1958). Although this matter has seemed always to come up within the context of the assertion of the marital privilege against incriminating testimony, the policy considerations therein announced are followed closely by other courts. See for example, In Re Snoonian, 502 F.2d 110 (1st Cir. 1974) (grand jury investigation). It is no less compelling where violation of that policy results in effectively tying the hands of a defendant.

In a far-flung conspiracy in which, as the evidence in this case indicates, people in the conspiracy were personal friends, who socialized together and spent time together, defense counsel for spouses on trial have a difficult time because of the jury's subliminal presumption that a husband and wife "team" must be in it together. Although no comfort can be taken by one spouse simply because the evidence against the other is stronger, United States v. Somers, 496 F.2d 723 (3d Cir. 1974), here the situation was different because defense counsel, upon summation for Mr. Sampson, wished to show that the telephone, the instrumentality of many of the conversations with other parties alleged in furtherance of the conspiracy, was solely in the name of Mrs. Sampson. Counsel wished to show further that she was in control of the household, and that she was, in fact, the dominant

party as between Lois and Joseph Sampson, and that the evidence showed that she stayed in the conspiracy well beyond the time that Joseph Sampson disappeared from the scene. The conspiracy continued and Mrs. Sampson's activity in it was independent.

To support this, the testimony of Ann Reynolds, the sister of Lois Sampson, would have been used to show that in Lois Sampson's conversations with Ann Henderson, Joseph Sampson's participation in narcotics dealing, if any, did not arise. What could be more natural than two sisters discussing plans for future profit in a "new venture" than the sister with the past history in this conspiracy saying "Listen, it's easy, Joe and I made a lot of money out of this for many years." The absence of such a conversation, which, had it occurred, Mrs. Henderson would have been sure to include as it certainly would have shored up her credibility and incriminated Lois Sampson further, was probative evidence in favor of Joseph Sampson.

Such summation by defense counsel in this situation can be analogized to testimony by one spouse against another and clearly would have been harmful to Lois Sampson. Since the court had refused Mr. Sampson a severance based on that proffer, Mr. Sampson elected not to make that argument.

The court below relied on United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), in denying the severance. There, the

"gushing summation" for a co-defendant was offered as the ground for the requested severance. DeSapio, supra, at 281. What the trial court failed to take into account in interpreting DeSapio is that there it was trying to gauge the effect of a summation already delivered, while here it was attempting to place itself in the shoes of both litigants and anticipate the summations' effect.

Leaving aside the question of whether a direct attack by a husband on the case of his wife is of the same order of magnitude of the Corallo-DeSapio conflict, the court failed to realize that in denying the motion the defendant was being put on the horns of the dilemma, and it is the dilemma itself, not the speculation as to its effect, which is at the fulcrum of the argument.

Given the dilemma, it does not matter what skill trial counsel would have in proffering it for the husband, or blunting it for the wife. The conflict itself destroys the marriage, not the result. No court should place a spouse in such a position where a severance is possible at a relatively low price.*

*The defendant Brightman's case was mistried and took two weeks to retry. Other defendants whose cases were severed were awaiting trial.

POINT II

THE COURT'S ADVANCE RULING ON
A TENDER OF PSYCHIATRIC EVIDENCE
WAS AN ABUSE OF DISCRETION.

As part of the 3500 material on Jack Brown, the government turned over Exhibit 3505W for identification.

(SA-1) Upon a reading of this document--a handwritten letter made by the witness Jack Brown--Harvey Roy Greenberg, a psychiatrist, was retained to make an analysis of the letter for the purposes of determining whether it would be of benefit to the defense.

Dr. Greenberg prepared a letter which was submitted to the Court for the purpose of obtaining authorization for further funds for CJA counsel to impeach by extrinsic evidence the testimony of Brown. (T4009) The Court took the matter under advisement (T4011) with the government opposing. Ultimately, the Court not only declined to authorize the funds, but also ruled, in essence, that the Court would not permit the evidence even if it was fully developed. (T4050-4054) The letter (SA-3) was marked as Court's Exhibit 6.

Relying on this anticipatory ruling, no counsel proceeded to call psychiatric witnesses as to the credibility of Jack Brown.

It is apparent that the outcome of this trial depended to a great extent upon the testimony of one man, Jack T. Brown. His credibility was the major issue upon which the jury had to pass. The opinion of the jury, formed upon their evaluation of

all the evidence laid before them, was the decisive question, as it is on all questions of fact. See United States v. Hiss, 88 F.Supp. 559 (SDNY, 1950). It is now even more clear than it was when Hiss, supra, was decided that the existence of insanity or mental derangement is admissible for the purposes of discrediting a witness, particularly since that testimony in this case was not being offered for competency but on credibility directly. See, Hanger v. United States, 398 F.2d 91 (8th Cir. 1968). Any testimony which aids in the jury's determination of party's credibility and veracity is relevant. Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975). Even courts which have declined to permit such testimony have recognized its relevance. See, United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), United States v. Pacelli, 531 F.2d 135 (2d Cir. 1975). See also, Comment, Psychiatric Evaluation of the Mentally Abnormal Witness, 59 Yale Law J. 1324; Weihoffen, Testimonial Competency and Credibility, 34 Geo.Wash.L.Rev. 53 (1968); Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, 48 Calif.Law.Rev. 648 (1960); Slovenko, Witnesses, Psychiatry and Credibility Testimony, 19 U.of Fla.Law Rev. 1 (1966); Mental Examination of Witnesses, 11 Syr.Law Review 149 (1960).

The rationale for excluding this testimony has been in the past that it will engender confusion rather than enlightenment and that it creates collateral issues which seem to take the issue of credibility out of the hands of the jury and places it squarely in the hands of an expert. See, Rule 403, Federal Rules of Evidence.

The government, in fact, relied on United States v. Pacelli, supra, in its argument against permitting further expenditures of money and/or admitting the evidence. It should be clear from a close reading of 3505W for identification and Court's Exhibit 6 that Pacelli and the other cases seeming to hold against the appellant's point of view are not appropriate.

Traditionally, extrinsic psychiatric testimony as to credibility has been offered to demonstrate a character trait which makes it unlikely that the witness would be telling the truth. See, United States v. Partin, 493 F.2d 750 (5th Cir. 1974); United States v. Barnard, 490 F.2d 907 (9th Cir. 1973). But here the extrinsic evidence was being offered as the offer of proof made by counsel (T4050) to show that the witness had a motive to lie. The preliminary evaluation given by Dr. Greenberg, admittedly on a relative paucity of evidence, is that the witness was "paranoid." Whether that paranoia was organic, caused by the witness's admitted cocaine abuse of a large number of years, or otherwise based is not material or germane for the purposes of this discussion. Counsel intended to argue and did argue to the Court in support of the application that the paranoia of this witness when he surrendered to the Federal Bureau of Investigation forced him, as a defense mechanism against his perceived physical jeopardy from laser lights and ovens which would dispose of his

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body, to concoct an inculpatory story which would put everyone who menaced him, in his delusions, behind bars where they could not reach him.*

Extrinsic evidence as to motive to lie is clearly of high probative value and generally permissible. United States v. Mallah, 503 F.2d 971, 976 (2d Cir. 1974). The extrinsic evidence offered here was of a condition recognized almost universally by the commentators as the most misleading to the layman and the most necessary of psychiatric explanation. This is necessary so that the lay jury, which is indeed the ultimate lie detector, may properly evaluate the witness's state of mind in reaching a determination as to his truthfulness.

It is true that where the probative value of evidence is low and the chance of confusion and misleading testimony is high, extrinsic evidence is excludable pursuant to Rule 403 of Federal Rules of Evidence. See, United States v. Bowe, 360 F.2d 1 (2d Cir. 1966). However, evidence of this nature is in fact quite high in probative value. Judge Jack B. Weinstein, in his massive commentaries in the Federal Rules of Evidence says:

At other times, however, evidence of drug usage may be relevant to something other than mental capacity. Evidence of drug involvement is, for instance, often relevant to the issue of bias as indicating why a witness is cooperating with the government and in such cases probative value may be sufficiently high to off-set the danger of prejudice.

Weinstein's Evidence, 607-40.

*At one time Jack Brown told the FBI that he was going to eliminate all the defendants (T2235)

Particularly in the area of analysis of the lengthy testimony of a paranoid, the probative value of the kind of extrinsic evidence tendered here is higher than usual.

Of all the psychotics, the most misleading to the layman is the paranoid, who entertains delusions of persecution and grandeur but whose personality may not appear as disturbed as that of other psychotics. No matter how absurd his delusions the paranoid may retain the appearance of normality and react in normal fashion to matters outside his delusional system.

Comment, Psychiatric Evaluation of the Abnormal Witness, supra, at 1327.

It is this intrinsic believability in a cleverly put together delusional system which so militates for the use of psychiatric testimony, if available.

The problem of a paranoid personality offers an illustrative example of the usefulness of psychiatric testimony, especially in civil cases. Paranoids, who have a marked proclivity for getting into legal difficulties, often make a favorable appearance in court when not crossed or agitated, and they may impress the untrained observer as rational and sincere. They could conceivably mislead a judge, an attorney or a jury, into the sincerity of their claim, but they would less likely deceive a clinically experienced psychiatrist. [Emphasis supplied]

Banay, The Psychiatrist in Court in Crime, Law and Corrections, at 433, cited by Slovenko, Witnesses, Psychiatry and Credibility, supra, at 14.

Even the mere explanation of the theory of paranoia by a psychiatrist witness would be helpful beyond measure to a jury trying to evaluate the testimony of a clever paranoid like the

witness, Jack T. Brown. Of course, no psychiatric witness would merely take the stand and make such an explanation without the factual foundation found initially in the letter, and which would hopefully have been in the rest of the examination which had been requested. See Point III infra.

The Court made its determination as to the non-admissibility of such testimony based on scanty evidence and on what was apparently more than a marginal dislike of some of the theories involved in psychiatric analysis. However, that is not a proper exercise of discretion. In fact, it is the mechanistic approach to new questions which is discouraged by this Court in United States v. Schwartz, 500 F.2d 1350, 1352 (2d Cir. 1974); United States v. Brown, 470 F.2d 285 (2d Cir. 1972).

The mere fact that this area of extrinsic evidence as to credibility is new in development is of little significance in any attempt to justify the Court's precipitous ruling.

The entire history of the law of evidence has been marked by a continuous search and more rational rules first as to the competency of witnesses and then as to the admissibility of evidence.

Robertson v. Hackensack Trust Co., 1 N.J. 304, 317, 63 A.2d 515, 521 (1969), concurring opinion Chief Justice Vanderbilt, then a State justice.

Professor Wigmore says that:

As the science of psychology progresses broadening its scope and enlarging its discoveries of precise truths and methods, it will make copious contributions in this particular field of knowledge. Judicial practice should liberally make use of such methods. All that should be required as a condition is the preliminary testimony of a

scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications...

The distinction between extrinsic testimony and cross-examination here has no significance. The usual objection to proof by extrinsic testimony should not be allowed to put any obstacle in the way of using expert testimony from psychologists....

Wigmore on Evidence, §990

The Court did, in fact, not have an open mind as to development of this extrinsic evidence, and foreclosed the possibility of its use in a way which was an abuse of its discretion.

POINT III

THE COURT'S REFUSAL TO AUTHORIZE
FOR THE CJA FUNDS WAS A DENIAL OF
EQUAL PROTECTION.

In this trial fourteen of the defendants were represented by counsel assigned under the Criminal Justice Act and for whom a determination of indigency had been made. They were not only without funds, but were also engaged in a lengthy trial which prevented them from working or otherwise providing funds for their own defense.

Courts can take judicial notice of the fact that physicians in general and psychiatrists in particular are notoriously unwilling to commit themselves to lengthy expenditures of time without a guarantee of payment. No court would expect counsel to guarantee to pay out of his own pocket, no matter how worthy the cause.

After having received authorization to obtain the initial letter analysis, counsel presented the analysis to the Court. Admittedly it was sparse, but counsel stated to the Court that it wished two further steps in order to prepare for the extrinsic psychiatric testimony to be proffered. See Point II supra. First, counsel requested that funds be authorized for an analysis of the transcript of the witness's testimony. The witness was on the stand for two weeks, a rather lengthy business. Secondly, if the situation warranted, counsel requested an examination of the witness himself.

Such an approach was the most reasonable way for counsel to proceed. Clearly, no trial lawyer with more than a grain of experience would put an expert witness on the stand with only the material of 3505W for identification as ammunition for analysis. Any such expert would be destroyed by competent trial counsel whose first two questions would probably be "Have you ever examined or seen the witness?" and "Do you know what, if anything, this witness said in this courtroom?"

It is also clear from the Exhibits that there was a prima facie showing as to the witness's state of mind at the time he surrendered himself. The Court said "I will recognize that it is certainly arguable that in the days immediately preceding April, 1975, Jack Brown was in rough shape, no question about that that is certainly arguable on this." (T4050-4051). That recognition then requires the Court to further recognize the obligations of counsel in a difficult case, and thereby to authorize the use of funds to develop to the fullest that prima facie showing. Then, if the expert finds appropriately, a full expatiation of the theory may be made to the jury in defense of the indigent. At the very least, a formal offer of proof can then be made.

The Criminal Justice Act of 1964, as amended, provides that

Counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense of his case may request them in an

an ex parte application. Upon finding after appropriate inquiry in an ex parte proceeding, that the services are necessary ...the court ...shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e) (1)

This Court has already recognized that a common concern for fairness at the trial of a criminal offense commands a liberal approach to these kind of applications. United States v. Durant, Docket No. 76-1198, USCA 2d Cir., November 24, 1976. In Durant, this Court relied on United States v. Schultz, 431 F.2d 907 (8th Cir. 1970) and United States v. Theriault, 440 F.2d 713 (5th Cir. 1971) (Wisdom, J. concurring). Both Schultz and Theriault involve the denial of funds for psychiatric testimony, citing United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1975).*

This Court seems to adopt a test that where the statute requires the District Judge to authorize defense services, he must do so when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them. Although the evidentiary issues involved in presentation of this point are complex, only upon a full explication and offer of proof with a psychiatric witness on the stand, could the court have made an adequate determination as to the balance between the probative value of the evidence and the evils decried by Rule 403 of the Federal Rules of Evidence.

*All three cases involved competency of defendants, but it would seem the service there is different only in quantity, not quality.

The Court's failure to permit such development denies these poor defendants the right which would have been accorded any defendant having the funds, which is to deny the right to present fully his claim for a competent evidentiary ruling at the very least. Denial of that right, therefore, requires reversal.

POINT IV

PHYSICAL EVIDENCE SEIZED FROM THE
HOME OF JOSEPH AND LOIS SAMPSON
SHOULD HAVE BEEN SUPPRESSED.

A. The 1974 Search Was Illegal.

The search warrant in question here was issued pursuant to a lengthy affidavit by Private Ronald A. Ricucci, a member of the Maryland police force, in an effort to make out probable cause for issuance. The target of the search was one Ray Sampson, the 16 year old son of the appellant herein. The warrant was issued for the purposes of finding marijuana and implements appurtenance pertaining thereto. A reading of the affidavit, however, indicates that there was no recent probable cause to support issuance of the warrant on July 24, 1974. (SA-6-12)

A large part of the affidavit in support involves the subject's sale of LSD, a substance not to be found in the warrant itself. The first information about Ray Sampson and marijuana was in fact in November, 1973, where two police officers, according to this affidavit, obtained a pass key and entered the premises of the subject of the warrant. Although they allege finding six ounces of marijuana underneath the balcony of the apartment herein in question, they made no arrests. A warrant which is based on a prior invalid search cannot be supported. United States v. Paroutian, 299 F.2d 468 (2d Cir. 1962); United States v. Soverio, 357 F.Supp. 1059 (SDNY 1972). United States v. Soles, 393 F.Supp. 325 (D.C.Calif. 1975). It seems

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apparent that the interests of the Maryland authorities was generated by that search and the subsequent surveillance turned up information about LSD and marijuana up to and about June, 1974. At that point, information regarding this subject seemed to cease, except for allegations 12 through 15 in the affidavit. Absent the information in those paragraphs, the information upon which the warrant was based would have been stale and therefore not the basis for probable cause. Sgro v. United States, 382 U.S. 206 (1932). See also, cases collected in United States v. Steeves, 525 F.2d 33, 38 (8th Cir. 1975).

The question presented to the court is whether the information subsequent to July 1, 1974, and more particularly of July 23, 1974, was sufficient to generate probable cause for the search warrant. A close analysis of the papers must indicate that it cannot.

Paragraphs 12, 13 and 14 indicate that on some date between July 1, 1974 and July 23, 1974, a marijuana plant was seen by the confidential informant and a police officer growing in a twelfth floor window at the address mentioned. It is difficult to imagine the nexus with growing a marijuana plant in one's window and selling marijuana. While the police officer alleges having seen upwards of one thousand marijuana plants to shore up his expertise, it is exceedingly hard to believe that from ground level he could recognize a marijuana

plant in the window or that from the window he could see a veritable forest of marijuana growing in the premises in question from which the harvest of saleable marijuana would be reaped.

The only other current information, therefore, upon which the warrant could be based would be the allegation contained in paragraph 15 of the affidavit in support, which stated that there was a small quantity of LSD and marijuana inside the apartment. It seems apparent that the Judge who issued the warrant did not credit this as providing probable cause for the simple reason that the warrant itself makes no mention of LSD. Were this allegation sufficient to generate the probable cause, the warrant would have been specific as to that substance as well. It seems apparent, therefore, that what the Judge was relying on primarily was the events of November 13, 1973.

Both in terms of staleness and the illegality of that search, no more need be said about it.

Additionally, the 1974 seizure was beyond the scope of the warrant and therefore unlawful. Although the 1974 search warrant authorized a search of the "premises known as Apartment 1211 of 11234 Oakleaf Drive," the affidavit upon which the basis of the warrant was issued dealt solely with the alleged criminal activities of Raymond Darryl Sampson, the son of the appellant herein.

The only illegal substance specifically referred to in the warrant itself other than "marijuana"* was "LSD" and none of this substance was found in the search of the apartment.

Clearly, the warrant did not authorize a general search of the appellant Joseph Sampson's property, nor could it.

Although evidence which is seized may be within the description of the warrant, this is not determinative of the issue of the legality of the search if [the warrant's] reach exceeds the bounds permitted by the fourth amendment.

Mascolo, Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy, 73 Dickinson L.Rev. 1, 13, citing inter alia, United States v. Martis, 352 F.2d 860, 864 (2d Cir. 1965), vacated on other grounds, 387 U.S. 425 (1967).

Joseph Sampson is nowhere mentioned in the affidavit underlying the 1974 warrant.

B. The 1976 Search Was Illegal.

On April 23, 1976, agents of three separate police authorities armed with bench warrants from the Southern District of New York, went to 1028 University Blvd., Prince George's County

*A perusal of the warrant reveals that it is in great part a form. The use therein of the phrase "controlled dangerous substance" must be limited to the contraband specifically referred to in the warrant, except for those items of contraband seized while in plain view. Marron v. United States, 275 U.S. 192, 196 (1927); Coolidge v. New Hampshire, 403 U.S. 469 n.26 (1971).

Maryland, which was the home of Lois and Joseph Sampson (H-5,6). Neither Lois Sampson nor Joseph Sampson was home. The door was answered by a young person, assumed to be their son. When it appeared that they were not home, the agents went outside to await their arrival. Some time later, a taxicab pulled up, from which a person identified as Mrs. Sampson was seen exiting (H-6). She was not approached at the taxicab, but was permitted to go upstairs to her home, where the agents gained entry and arrested her. (H-8)

Numerous officers inspected the premises for the presence of Joseph Sampson, although they clearly knew he was not there. It was no surprise that they did not find him. (H-10) They then settled down to wait for him and were rewarded when he came home shortly after 9:45 a.m. (H-12).

Some time after their entry, Agent Gheen of Prince George County, Maryland, Police Department saw an implement with some material in plain and open view. That collection has been variously described as 'a marijuana smoking pipe with suspected marijuana and marijuana residue contained in the bowl of the pipe,' (Affidavit of Gheen in support of application for search warrant) (SA-17), or "some marijuana in a smoking pipe," (H-74, direct testimony of Agent Gheen), or "residue in the pipe" (H-79, Gheen on cross).

Taking that material to the police crime lab, he performed a marijuana field test on the scrapings from the pipe. (H-79)

It was the findings that the residue was marijuana that formed the basis for the search warrant issued that day. (SA-13-19). What is uncontested from the hearing is that Agent Gheen saw a pipe with ashes in it and seized it without probable cause only on the assumption that it was marijuana. There was no evidentiary justification at the hearing, or in fact in the affidavit, to warrant the assumption he made, which was the basis for the seizure. Mere possession of a pipe with ashes in it is not probable cause. There was no aroma of marijuana in the room. Agent Gheen denied knowing who was the occupant of the room, although he clearly knew that there was a young person in residence. In short, no foundation was laid either at the hearing or in the application for the warrant for assuming that the implement and material was anything other than legal material legally possessed.

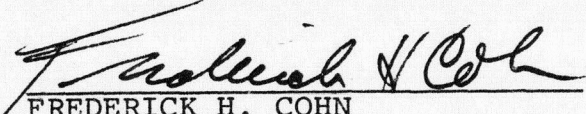
What is clear then is that the search warrant is based on information which was either purposefully ambiguous or inaccurately given to the magistrate, or so negligently phrased as to misinform him. Search warrants based on an illegal search or seizure are themselves illegal. United States v. Paroutian, 299 F.2d 468 (2d Cir. 1962); United States v. Soverio, 357 F.Supp. 1059 (SDNY 1972). Courts have regularly required the exclusion of derivative evidence as the indirect result of an unlawful search. Nardone v. United States, 308 U.S. 338 (1939); Silver Thorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Since there was no probable cause to seize the pipe and substance upon which the test was performed, the search warrant was illegally granted.

C O N C L U S I O N

FOR ALL THE FOREGOING REASONS, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,


FREDERICK H. COHN
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